

## Notice of Decision and Reasons for Decision

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Applicant:	'FE4'
Agency:	Victoria Police
Decision date:	24 May 2023
Exemptions considered:	Sections 31(1)(a) and 33(1)
Citation:	'FE4' and Victoria Police (Freedom of Information) [2023] VICmr 48 (24 May 2023)

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FREEDOM OF INFORMATION – police records – police investigation – theft of motor vehicle – applicant victim of crime – witness information – Law Enforcement Assistance Program (**LEAP**) documents – ongoing investigation – disclosure of personal affairs information unreasonable

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied information to which the Agency refused access under sections 31(1)(a) and 33(1) is exempt from release.

My reasons for decision follow.

Joanne Kummrow  
**Public Access Deputy Commissioner**

24 May 2023

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  - ... seeking the name of the offender who stole our car back in [date].
  - ... seeking these details of the offender so that we are not put out of pocket for our car being stolen...
  - The car was stolen in [suburb] on [date]. Car: [vehicle model] [colour] roof and mirrors Number plate: [number] ... [police station].
2. The Agency identified 10 pages of documents falling within the terms of the Applicant's request and refused access to the documents in part under sections 31(1)(a) and 33(1). The Agency's decision letter sets out the reasons for its decision.

### Review Application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.
9. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

## Review of exemptions

### *Section 33(1) – Personal affairs information of third parties*

10. A document is exempt under section 33(1) if two conditions are satisfied:
  - (a) disclosure of the document under the FOI Act would ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person other than the Applicant (a **third party**); and
  - (b) such disclosure would be ‘unreasonable’.
11. Information relating to a person’s ‘personal affairs’ includes information that identifies any person or discloses their address or location.
12. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to identify a third party.<sup>2</sup>

### *Do the documents contain personal affairs information of third parties?*

13. The Agency relies on section 33(1) to exempt names, dates of birth, addresses, mobile numbers, LEAP reference numbers, personal descriptors and certain information provided to police by a person of interest and witnesses (**third parties**).
14. I am satisfied the exempted information is personal affairs information as contemplated by section 33(1).

### *Would disclosure of the personal affairs information be unreasonable?*

15. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
16. The Agency’s decision letter provides:

I am satisfied that disclosure of the personal information would be unreasonable in the circumstances, pursuant to section 33(1) of the Act.

In reaching my decision I have taken the following into account:

- the matter is still currently under police investigation and accordingly the ‘personal information’ has not been presented in court
- the purpose for which Victoria Police obtained the personal information
- the likelihood that the parties involved would object to the release of their personal information
- the likelihood of further disclosure of the personal information, should it be released
- the fact that a release under FOI imposes no restrictions on further use or dissemination

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<sup>2</sup> *O’Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

- in these circumstances it is unreasonable to consult with the parties involved regarding the release of their personal information to you
- on the information available to me, I do not consider there to be any public interest promoted by further release of the personal affairs information to you

17. Whether disclosure would be unreasonable involves balancing several factors that would relativity and probatively bear upon this question. The Victorian Supreme Court of Appeal in *Victoria Police v Marke*,<sup>3</sup> held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.

18. In determining whether disclosure of the personal affair information would be unreasonable for this matter, I have considered the following:

(a) The nature of the personal affairs information and the circumstances in which the information was obtained

I am satisfied the personal affairs information was obtained by the Agency in the context of a police investigation regarding the theft of the Applicant's car.

I consider when individuals provide such information to police, they do so under the assumption any information they provide will be held in confidence and used for the purpose of police investigating an alleged incident or crime or any subsequent criminal prosecution. In such circumstances, I consider information obtained from third parties during and in relation to police investigation is sensitive and confidential in nature.

(b) The Applicant's interest in the information

The FOI Act provides a general right of access to documents that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.<sup>4</sup>

The Applicant states they seek access to the information for the purpose of providing the information to their insurance company to recover the excess charges they have paid following the theft of their car. I acknowledge the Applicant's interest in obtaining accesses in full to the document is for a personal reason and to avoid out of pocket expenses arising from their car being stolen by a third party.

(c) Whether any public interest would be promoted by release of the information

I consider there are public interest factors both for and against disclosure in situations such as in this matter.

In principle, I acknowledge there is a public interest in a victim of crime being able to know the identity of the perpetrator of a crime committed against them.<sup>5</sup>

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<sup>3</sup> [2008] VSCA 218 at [76].

<sup>4</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>5</sup> *AB v Department of Human Services* [2001] VCAT 2020.

Equally, I accept there is a public interest in the Agency, as a law enforcement agency, maintaining and preserving the ability to receive confidential information from third parties and witnesses in order to conduct investigations into alleged breaches or possible breaches of the criminal law.

As discussed above, I consider the preparedness of a person or a witness to cooperate with a police investigation will often be dependent on the assumption any information provided will be held in confidence and used for the purpose of the police investigation and any subsequent criminal prosecution only.

In this case, I also consider the Agency's advice that the investigation is ongoing and the information is yet to be presented and tested in open court.

While I understand the Applicant's interest in obtaining access to the requested information, I am not satisfied this factor outweighs the competing public interest in the Agency being able to carry out its law enforcement functions. Further, I consider there is a risk that releasing the documents at this time would jeopardise the ongoing investigation which would prejudice the proper administration of justice.

- (d) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

The Agency consulted with certain third parties, who consented to the release of their information. In all other cases, I have limited information before me as to whether the remaining third parties would object to the release of their personal affairs information.

Nonetheless, having considered the nature of the information and the context in which it was obtained by the Agency, namely through a police investigation, I am satisfied certain third parties would be reasonably likely to object to the release of their personal affairs information in the documents under the FOI Act.

- (e) The likelihood of further disclosure of information, if released

The FOI Act does not impose any conditions or restrictions on an applicant's use of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information if released.

Noting the reasons the Applicant seeks access to documents, it is reasonable to conclude that they intend to disseminate the information further, albeit in a limited context.

- (f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>6</sup>

There is no information before me to suggest this is a relevant factor in this matter.

19. Having weighed the above factors, on balance, I am satisfied disclosure of the third party personal affairs information would be unreasonable. I have considered the circumstances in

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<sup>6</sup> Section 33(2A).

which the information was obtained by the Agency in carrying out its law enforcement functions, and the reasonable likelihood the third parties would not expect nor consent to their personal affairs information being disclosed under the FOI Act, particularly where the information in the documents has not been aired or tested in open court.

20. Accordingly, I am satisfied in the personal affairs information in the documents is exempt from release under section 33(1).

**Section 31(1)(a) – Law enforcement documents**

21. Section 31(1)(a) provides a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to, prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance.
22. The term ‘reasonably likely’ means there is a real chance of an event occurring; it is not fanciful or remote.<sup>7</sup>
23. ‘Prejudice’ means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>8</sup>
24. ‘In a particular instance’ does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.<sup>9</sup>
25. In determining the application of section 31(1), section 31(2) provides that the section will not apply to:
- (a) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law;
  - (b) a document revealing the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law;
  - (c) a document containing any general outline of the structure of any programme adopted by an agency for investigating breaches of, or enforcing or administering, the law;
  - (d) a report on the degree of success achieved in any programme adopted by an agency for investigating breaches of, or enforcing or administering, the law;
  - (e) a report prepared in the course of routine law enforcement inspections or investigations by an agency which has the function of enforcing and regulating compliance with a particular law other than the criminal law;
  - (f) a report on a law enforcement investigation, where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation—
- if it is in the public interest that access to the document should be granted under this Act.
26. The information to which the Agency refused access is contained in its internal database known as the Law Enforcement Assistance Program or ‘LEAP’. I am constrained from

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<sup>7</sup> *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

<sup>8</sup> *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

<sup>9</sup> *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

describing the information in detail so as not to undermine the exemption relied on to refuse access to the information. Having viewed the relevant information, I am satisfied it was recorded in connection with the Agency's ongoing investigation of an offence reported by the Applicant.

27. With respect to the application of section 31(1)(a), the Agency's decision letter states:

...the investigation is ongoing, and a brief of evidence is being prepared for possible prosecution. In the circumstances I consider the release of the exempt information at this time would be reasonably likely to prejudice the police investigation, pursuant to the provisions of section 31(1)(a) of the Act.

28. In *RFJ v Police (Vic)*,<sup>10</sup> the Victorian Civil and Administrative Tribunal (**VCAT**) accepted evidence that the disclosure of a collection of investigation documents would be reasonably likely to prejudice both an investigation and the enforcement of the law in respect of the matters subject to investigation.

29. Having read the exempted information and noting the advice of the Agency that the information relates to an unresolved investigation, I am satisfied disclosure in this instance would be reasonably likely to prejudice the proper investigation of a possible breach of the law.

30. I note section 31(2) provides the exemption under section 31(1) does not apply when there is a public interest in granting access to the documents. However, I am not satisfied any of the exceptions set out in section 31(2) apply to the relevant information subject to review.

31. Accordingly, I am satisfied the information identified by the Agency is exempt from release under section 31(1)(a).

### ***Section 25 – Deletion of exempt or irrelevant information***

32. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>11</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.<sup>12</sup>

34. I am satisfied the information deleted from the documents by the Agency is irrelevant as it concerns the Agency officer who printed the documents for administrative purposes in the processing of the Applicant's FOI request only and does not relate to the terms of the request.

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<sup>10</sup> [2013] VCAT 1267 at [135].

<sup>11</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>12</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140][155].

35. Given my decision is the same as the Agency's decision and it granted access to the documents in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted.

### **Conclusion**

36. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 31(1)(a) and 33(1).
37. Accordingly, the result of my decision is the same as the Agency's and no further information is to be released.

### **Review rights**

38. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>13</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>14</sup>
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>15</sup>
41. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
42. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>16</sup>

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<sup>13</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>14</sup> Section 52(5).

<sup>15</sup> Section 52(9).

<sup>16</sup> Sections 50(3F) and 50(3FA).